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No. 586

# In The
# SUPREME COURT OF THE UNITED STATES
October Term, 1944

ANNIE MAE BRADLEY,
*Petitioner,*

vs.

LENA M. BRADLEY AND UNITED STATES OF AMERICA,
*Respondents*

ON PETITION FOR CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

## Response and Brief Opposing Grant of Writ

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October 28, 1944.

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I.

**The Petition for Certiorari Was Not Filed Within Time.**

The Statute (28 U.S.C.A. 350), provides:

"No * * * writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless

> application therefor be duly made within three months after the entry of such judgment or decree. * * *."

The opinion, judgment and decree of the Circuit Court of Appeals was filed May 30, 1944.

Within 30 days thereafter, petition for re-hearing was filed in the Circuit Court of Appeals in accordance with Rule 24 of said Court. Said petition for re-hearing and request to argue such petition were denied July 5, 1944.

Thereafter petitioner herein for certiorari filed in the Circuit Court of Appeals (without obtaining permission of the Court) her petition to reopen said case (a proceeding and petition not authorized by law or Court rule so far as we are able to ascertain), and said petition to re-open was denied by the Circuit Court of Appeals July 21, 1944.

No stay of Mandate by the Circuit of Appeals was ever requested by petitioner herein for certiorari, pending application to the Supreme Court for certiorari as provided by Rule 28 of the Circuit Court of Appeals.

The Circuit Court of Appeals on July 28, 1944, issued its mandate in said case to the United States District Court for the Eastern District of Oklahoma, the trial Court.

The rule is that the three months begin to run in case petition for re-hearing is timely filed, from the denial of the petition for re-hearing.

*Citizens Bank of Michigan City, Ind.* v. *Opperman*, 39 S. Ct. 330, 249 U.S. 448, 63 L. Ed. 701;

*Gypsy Oil Co.* v. *Escoe*, 48 S. Ct. 112, 275 U.S. 498, 72 L. Ed. 393.

The petition for re-hearing having been overruled and denied on July 5, 1944, the three months time to apply for certiorari began on that date and expired with October 5, 1944.

The filing of the unauthorized petition to re-open the case (without permission of the Circuit Court of Appeals) does not operate to suspend the running of the three months period. Same did not ask for "re-hearing" but was a request to "re-open" the case.

*Department of Banking, State of Nebraska, etc.* v. *Pink*, 63 S. Ct. 233, 317 U. S. 264, 87 L. Ed. 254.

The petition for writ of certiorari was not mailed from Houston, Texas, until October 10, 1944, the copy of same served on counsel filing this response and brief was received October 12, 1944.

Therefore, since the application for certiorari herein was not made within the three months allowed, it was not within time and should be dismissed and denied.

## II.

### The Petition For Certiorari Should Be Denied On The Merits.

The question involved in this case was whether a flying officer in the U. S. Army, had sufficiently and legally changed the beneficiary of his National Service Life Insurance from his mother to his wife.

The applicable regulation governing the right to change the beneficiary, as promulgated by the Administrator in pursuance of his statutory authority, 54 Stat. 1012, 38 U.S.C.A. 808, provides:

> "* * * a change of beneficiary to be effective must be made by notice in writing signed by the insured, and forwarded to the Veterans' Administration by the insured or his agent. * * *."

As pointed out in the opinion of the Circuit Court of Appeals the soldier had signed a certain "Confidential Personal Report" required of all flying officers, the declared purpose of which was to compile and maintain accurate personal records of all officers of the Air Corps. This form was filled in pursuant to War Department order requiring same. It was filed with the Soldier's commanding officers, and after the soldier's death it was forwarded by such commanding officers to the Veterans' Administration at its request. This form contained a statement indicating the insured thought his wife was beneficiary.

The only other evidence of change of beneficiary (over our objection) were oral statements made by the

wife, who claimed the proceeds of the policy by virtue of the purported change of beneficiary, to the effect that insured told her that "he had taken care of the insurance at the Army base."

The decision of the Circuit Court of Appeals was that this was not sufficient to amount to change of beneficiary.

The decision of the Circuit Court of Appeals goes clearly into each and all of the authorities relied on by the petitioner herein; clearly demonstrates the authorities relied on by petitioner are inapplicable to the facts in this case.

As disclosed by the opinion of the Circuit Court of Appeals, there is a clear distinction between this and the case of *Kaschefsky* v. *Kaschefsky*, 110 Fed. (2d) 836 (Sixth Circuit Court of Appeals), and there is no conflict between the decision in this case and that in the Kaschefsky case.

The petition for certiorari herein should therefore be denied also upon the merits.

Respectfully submitted.

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*Lena M. Bradley.*

October 28, 1944.